FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 6 1960
JAMES R. BROWNING, Clerk

No. 49

In the

Supreme Court of the United States

October Term 1960

UNITED STATES OF AMERICA,
Petitioner

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AND APPENDIX FOR THE RESPONDENT

GEORGE D. GIBSON
RALPH H. FERRELL, JR.
FRANCIS V. LOWDEN, JR.
PERKINS WILSON
1003 Electric Building
Richmond 12, Virginia
Counsel for Respondent

Of Counsel:
HUNTON, WILLIAMS, GAY,
POWELL & GIBSON
1003 Electric Building
Richmond 12, Virginia

October, 1960

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	21
ARGUMENT	23
Introduction	23
I. Respondent Was Entitled to Compensation for Its Easement to Flood	23
II. Compensation for the Government's Flowage Easement Was Correctly Determined	30
III. The United States Has No Concern With the Distribution of the Award	33
IV. The Allocation for Respondent's Easement Was Proper	34
CONCLUSION	36
APPENDIX:	
Table of Valuations and Commission's Findings	App. 1

TABLE OF CITATIONS

Cases

Boom Company v. Patterson, 98 U. S. 403 (1878) 24

Boston Chamber of Commerce v. Boston, 217 U. S. 189 (1910) 35

Brooklyn Eastern District Terminal v. City of New York, 139 F. 2d 1007 (2d Cir. 1944), cert. denied, 322 U. S. 747 (1944) 28

Page

Burkhart v. United States, 227 F. 2d 659 (9th Cir. 1955) 30

Chapman, U. S. ex rel., v. F. P. C., 345 U. S. 153 (1953) 14

City of St. Paul v. Certain Lands, etc., 58 F. 2d 805 (8th Cir. 1931) 32

Cullen & Vaughan Co. v. Bender Co., 122 Ohio St. 83, 170 N. E. 633 (1930) 30

Duckett & Co. v. United States, 266 U. S. 149 (1924) 30, 32

Eagle Lake Improvement Co. v. United States, 160 F. 2d 182 (5th Cir. 1947), cert. denied sub nom., Humble Oil & Ref. Co. v. United States, 332 U. S. 762 (1947) 31

Humble Oil & Ref. Co. v. United States, 332 U. S. 762 (1947), denying cert., Eagle Lake Improvement Co. v. United States, 160 F. 2d 182 (5th Cir. 1947) 30

Hurley v. Kincaid, 285 U. S. 95 (1932) 36

Jacobs v. United States, 290 U. S. 13 (1933) 36

Karlson v. United States, 82 F. 2d 330 (8th Cir. 1936) 32

Lindsey v. Clark, 193 Va. 522, 39 S. E. 2d 312 (1952) 24

Meadows v. United States, 144 F. 2d 741 (4th Cir. 1944) 30, 32

Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893) 25, 31

Norfolk & Western Ry. Co. v. Obenchain, 107 Va. 506, 59 S. E. 404 (1907) 24

Olson v. United States, 292 U. S. 246 (1934) 25, 32

Pumpelly v. Green Bay & M. Canal Co., 13 Wall. 166 (1872) 22, 26

Richmond v. Richmond Sand Co., 123 Va. 1, 96 S. E. 204 (1918) 24

Roberts v. City of New York, 295 U. S. 264 (1935) 35

Shoemaker v. United States, 147 U. S. 283 (1892) 25

Slattery Co. v. United States, 231 F. 2d 37 (5th Cir. 1956) 32

Page

State of Nebraska v. United States, 164 F. 2d 866 (8th Cir. 1947), cert. denied, 334 U. S. 815 (1948), affirming, United States v. 19,573.59 Acres, etc., 70 F. Supp. 610 (D. Neb. 1947) 33

Stokes, Inc., v. Matney, 194 Va. 339, 73 S. E. 2d 369 (1952) 24

Twin City Power Co. v. United States, 215 F. 2d 592 (4th Cir. 1954), rev'd, 350 U. S. 222 (1956) 12, 15

United States v. Adamant Co., 197 F. 2d 1 (9th Cir. 1952) 33

United States v. Augusta Power Co., 278 F. 2d 71 (5th Cir. 1960) 28

United States v. Certain Lands in Borough of Brooklyn, 129 F. 2d 577 (2d Cir. 1942) 33

United States v. Chandler-Dunbar Co., 229 U. S. 53 (1913) 22, 25, 26

United States v. Cress, 246 U. S. 316 (1917) 22, 26, 29, 32, 36

United States v. Dickenson, 152 F. 2d 865 (4th Cir. 1946), aff'd, 331 U. S. 745 (1947) 36

United States v. Dow, 357 U. S. 17 (1958) 36

United States v. Dunnington, 146 U. S. 338 (1892) 31

United States v. Grand River Dam Authority, 363 U. S. 229 (1960) 22, 28

United States v. Kansas City Life Ins. Co., 339 U. S. 799 (1950) 22, 26, 27

United States v. Miller, 317 U. S. 369 (1943) 25, 32

United States v. 19,573.59 Acres, etc., 70 F. Supp. 610 (D. Neb. 1947), aff'd sub nom., State of Nebraska v. United States, 164 F. 2d 866 (8th Cir. 1947), cert. denied 334 U. S. 815 (1948) 33

United States v. Petty Motor Co., 327 U. S. 372 (1940) 31, 32

United States v. Powelson, 138 F. 2d 343 (4th Cir. 1943), cert. denied 321 U. S. 773 (1944) 25

Page

United States ex rel. Powelson v. T. V. A., 319 U. S. 266 (1943) ... 26

United States v. 25,936 Acres, etc., 153 F. 2d 277 (3d Cir. 1946) ... 31

United States v. Twin City Power Co., 350 U. S. 222 (1950) ... 15, 22, 26

United States v. Twin City Power Co., 248 F. 2d 108 (4th Cir. 1957), rehearing denied, 248 F. 2d 114 (1957), cert. denied, 356 U. S. 918 (1958) ... 28

United States v. 297.72 Acres, etc., 218 F. 2d 524 (4th Cir. 1955) ... 17

United States v. 297.72 Acres, etc., 235 F. 2d 327 (4th Cir. 1956), rehearing den., 237 F. 2d 166 (1956) ... 15, 27, 32, 35

United States v. 297.72 Acres, etc., 237 F. 2d 166 (4th Cir. 1956) ... 16, 32

United States v. 297.72 Acres, etc., 270 F. 2d 707 (4th Cir. 1959), cert. granted, sub nom. United States v. Virginia Electric and Power Co., 362 U. S. 947 (1960) ... 15, 17, 21, 26, 28

United States v. Virginia Electric and Power Co., 350 U. S. 956 (1956) ... 15

United States v. Welch, 217 U. S. 333 (1910) ... 31

Statutes

33 U. S. C. §§ 591, 595, 701c-2 ... 17

Va. Code Ann. § 55-6 (Repl. Vol. 1959) ... 24

Other Authorities

2 American Law of Property § 8.83, n. 1, (Casner ed. 1952) ... 24

Annotations

L. R. A. 1917 A, p. 680 ... 31, 33

69 A. L. R. 1263, supp., 106 A. L. R. 1211 & 1247 ... 31

75 A. L. R. 855 ... 34

7 A. L. R. 2d 364 ... 34

	Page
Barron & Holtzoff, Federal Practice and Procedure (Rules ed.) § 1519	33
Farnham, Waters and Water Rights	
§ 62-75	25
§ 79(a)	26
§ 79(b)	26
Fed. R. Civ. P.	
53(e)(2)	19
71A(c)	33
House Document No. 650, 78th Cong., 2d Sess.	13, 17
Lewis, Eminent Domain (3d ed. 1909)	
§ 707, p. 1233	24
§ 716	31
Nichols, Eminent Domain (3d ed. 1954)	
§ 5.3[4]	33
§ 12.36[1]	31
§ 12.42[2]	33
Powell, Real Property (1952)	
§ 404	24
§ 405	24
§ 423, p. 194	24
§ 426	34
Restatement, Property (1944)	
§ 450	24
§ 489	24
§ 507	32
§ 508	34
Saxon, Appraising Flowage Easements, The Appraisal Journal, October 1956, pp. 490 ff.	32
United States Army Corps of Engineers, Real Property Appraisers' Handbook (U. S. Gov't Printing Office, October 1955)	32

In the

Supreme Court of the United States

October Term 1960

No. 49

UNITED STATES OF AMERICA,
Petitioner

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT*

OPINIONS BELOW

The district court did not write an opinion but the reasons for its holding are stated in its judgment-order. (R. 143-150). The four opinions by the court of appeals are adequately referred to in petitioner's brief. (P. Br. 4).

* All emphasis in this brief has been added unless otherwise indicated. Reference to the Appendix to this brief is shown as "App. p. ."

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief. (P. Br. 1-2).

QUESTIONS PRESENTED

Respondent cannot accept petitioner's statement of the questions presented (P. Br. 3) because they are not "expressed in the terms and circumstances of the case."[1] Therefore, respondent is obliged to first summarize the case before stating the questions presented to the Court in this case.

This was an *in rem* condemnation proceeding in which the United States acquired a perpetual easement to flood permanently and intermittently fast land riparian to a navigable stream. The only questions in the district court were (1) the amount of just compensation for the Government's taking of an easement to flood 1840 acres of a 7400 acre tract, and (2) the allocation of such compensation between the owner of the underlying fee and respondent which owned a perpetual and exclusive easement to flood permanently 1540 of the acres included in the Government's taking.

Prior to institution of the *in rem* action, the owner of the underlying fee, Mrs. Olive Vaughan Williams, agreed with the United States in an option contract, expressly subject to all of respondent's rights in the entire 7400 acre tract to accept $1.00 for the additional servitude imposed by the government upon the tract. Mrs. Williams understood, and the Government represented, it would acquire respondent's rights separately. But the Government obtained no conveyance from Mrs. Williams pursuant to this option and elected instead to acquire its flowage easement by exercising its power of eminent domain against the land itself.

[1] U. S. Sup. Ct. R. 40(1)(d)(1). They are hypothetical and not supported by a fair and impartial consideration of the entire record.

The commissioners filed a unanimous report that, after excluding any element of value arising from the availability of the land for water power purposes, $70,920 was the difference between the fair market value of the 7400 acre tract before and after the imposition of the Government's flowage easement. The Government objected to this determination on the theory that only respondent's easement to flood should be valued and it had no value as a matter of law. The commissioners' report was confirmed and adopted by the district court. The district court proceeded to allocate the award and determined that for the extinguishment of its easement to flood respondent should receive $65,520 as its share of the compensation for the taking of the Government's flowage easement.

Mrs. Williams made no claim to any portion of the compensation allocable to her for the added servitude imposed upon the land, and she did not contest either respondent's right to be paid or the amount of its share of such compensation.

The evidence offered by the United States was directed only to respondent's share of the compensation. On the basis of its negotiations with Mrs. Williams and the option contract, the Government claimed that it had made full and complete settlement for all damages to the residue and, therefore, in determining the amount to be paid respondent for its easement to flood a portion of the 7400 acre tract, the district court should exclude any element of compensation based on damage to the residue. The respondent offered evidence in rebuttal and the district court rejected petitioner's contention.

The court of appeals affirmed the district court.

Thus, the only questions which can now be presented to this Court in this case are:

1. Whether the Government is entitled to acquire in an *in rem* condemnation proceeding a flowage easement over land riparian to a navigable stream without making compensation to the owner of a perpetual and exclusive easement to flood the same land, who had already compensated the fee owner therefor, and if so,

2. Whether the United States in an *in rem* condemnation proceeding has standing to question the allocation of compensation for the Government's flowage easement between the owners of various interests in the property taken.

3. And, if this Court answers the second question in the affirmative, whether the district court's allocation to respondent for its property interest was proper.

While petitioner's statement of the questions presented (P. Br. 3) seemingly relates only to respondent's third question, petitioner's argument shows that the Government's position here is that, as a matter of law, there can be no basis for valuing an easement to flood land riparian to a navigable stream when that easement is extinguished by the Government's condemnation of a flowage easement over the same land. Carried to its logical conclusion the Government's argument would permit it to acquire an easement to flood land without paying anyone.

Respondent submits that its restatement of the questions presented provides a more orderly basis for consideration of the issues.

STATEMENT OF THE CASE

The Government's arguments for reversal are not justified by a consideration of the entire record. In fairness to the courts whose decisions are challenged and to respondent's position throughout this extended litigation, a restatement of the case must be made.

This case involves the acquisition by the United States under a declaration of taking filed October 23, 1952, and the deposit of estimated compensation of $1.00, of a perpetual easement on land lying between the banks of the Dan and Banister Rivers and contour 330', an area of approximately 1840 acres[2] of a 7400 acre tract, known as the "Falkland Estate" to "overflow, permanently or intermittently, as may be necessary for the construction, maintenance and operation of the John H. Kerr Dam and Reservoir" (R. 8-14).

On the date of taking Mrs. Williams owned the fee subject to respondent's riparian and other rights in the "entire" 7400 acre Falkland Estate, including a perpetual and exclusive easement to flood *permanently* up to contour 321', an area of approximately 1540 acres (R. 67 at 68-70).[3] The 300 acres lying between contours 321' and 330' are on the face of the "bluffs" (R. 302).

The sketch on the next page based on a contour map introduced as Government's Exhibit No. 2 (R. 236) shows graphically the extent and location of these easements.

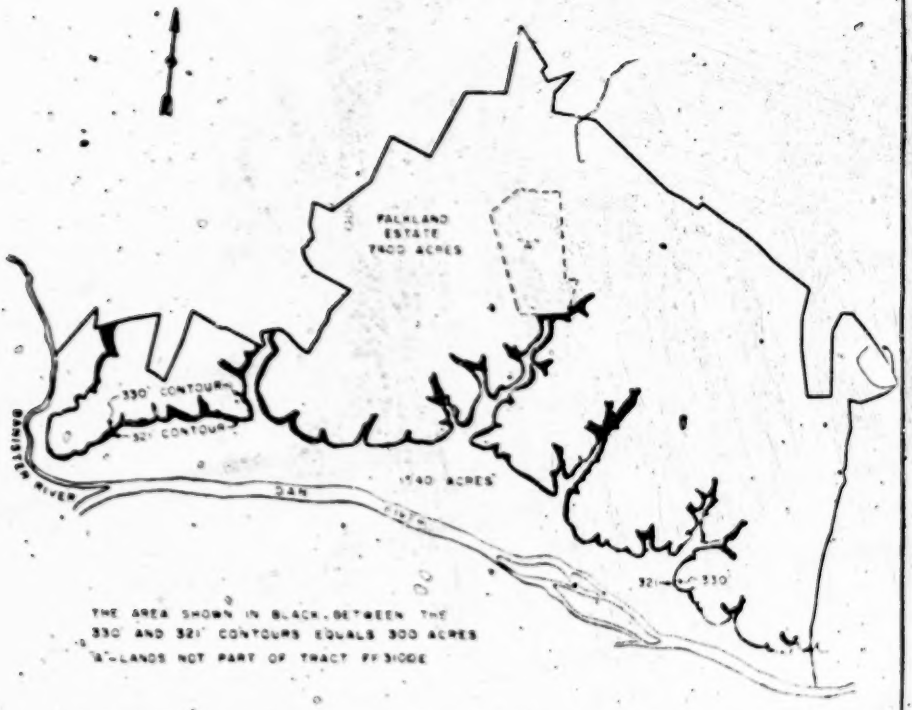
The Government's statement that "the *rights embraced* by respondent's easements" (P. Br. 14) are the water

---

[2] Often referred to in the record as "Tract FF-3100E".

[3] Stipulation of facts paras. 7, 8, 9, and 11 (R. 68-70). Compare plaintiff's motion for pretrial conference (R. 206-214, esp. at 211) and respondent's answer to plaintiff's motion for judgment (R. 196 at 198) and amended answer (R. 15-16). The foregoing references show that the parties' respective versions of the rights owned by the respondent in the entire Falkland Estate were unacceptable each to the other and, therefore, the stipulation (R. 67 at 68) referred to the basic deed of October 14, 1925 (Def. Exh. C, *infra*), as corrected by the deed of January 3, 1942 (Def. Exh. D, *infra*) for a description of respondent's rights.

Petitioner's statement that "substantial acreage embraced in the Government's taking was acquired by the Falkland Estate subsequent to any rights conveyed to the respondent (R. 160)," (P. Br. 25, n. 14), is contrary to the stipulation of facts, was refuted in the cross-examination of the Government's project manager (R. 296-299) and was not deemed worth noticing by the court of appeals.



rights and privileges mentioned in paragraph 8 of the stipulation (P. Br. 6 and 14) is wrong. Paragraph 8, which the Government insisted on including in the stipulation[1] refers *only* to water rights and privileges. This case involves respondent's perpetual and exclusive easement to flood permanently 1,540 acres of the 7400 acre tract. This easement is not mentioned or even referred to in paragraph 8 of the stipulation. It is covered instead by paragraphs 7, 9, 10, 11, and 12 in the stipulation (R. 67 at 68-70). Paragraph 9 refers to the deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company (Def. Exh. C, R. 172) as corrected by the deed of January 3, 1942, from Hannah N. Vaughan (Def. Exh. D,

[1] Compare Plaintiff's Interrogatory 1 (R. 16), Defendant's Answer (1) (R. 20-21).

R. 177) for a description of respondent's rights which included the easement to flood involved in this case. By this general warranty deed[5] with express covenants for title, Mrs. Williams' predecessor in title granted to respondent's predecessor in title, *inter alia*, "the following property rights, privileges and immunities, namely:

* * *

"SECOND: The right to build . . . any dam or dams the . . . Company may desire, across the Dan River, at any point or points, it may desire . . . so that the normal water level[6] behind said dam, or dams shall not be higher than the extreme height to which said . . . Company has the right to elevate the waters of the Dan River, in the aforesaid deed from Halifax . . . unto the said . . . Company; *together with all* riparian rights, water rights, *easements*, and *rights of floodage*, to the fullest extent of said maximum normal water level, as hereinabove provided, *so far as said maximum normal water level concerns or affects, or may hereafter concern or affect, the present property of Falkland Estate, Incorporated*. . . . [up to contour 321' an area of 1540 acres"] which present property so to be affected consists of approximately 6100 [7400"] acres . . . also:

"THIRD[8]: . . . .

"FOURTH: Falkland Estate, Incorporated, doth here-

[5]The three deeds referred to therein, two dated May 1, 1907, and one dated January 18, 1920 (Def. Exhs. E, F and G; R. 180, 184; 187) were the source of title to only a small portion (390 acres) of the 7400 acres that were involved in the deed of October 14, 1925.

[6]Stipulation, R. 67 at 69-70, paras. 10 and 11.

[7]Ibid. at R. 68-69, para. 7.

[8]This paragraph relates to rights to abut dams and build powerhouses on the Falkland tract with rights of ingress and egress. It also provides for the acquisition of rights of way for transmission lines and land for dwellings and outbuildings at the rate of $20 an acre. This is referred to in petitioner's brief, p. 17, n. 6, but it is not material to this case.

by covenant, to run with the land, that it doth hereby grant and release . . . all claims for damages . . . to the residue of the real estate . . . as the result of the flooding of any of the present land of the said Falkland Estate. . . .

"FIFTH . . . .

"SIXTH: It is further covenanted and agreed that *the provisions of this deed are* hereby *covenants running with the land, and binding upon the parties hereto, their successors or assigns.*"

In the option contract, prepared by the Government,[10] dated April 30, 1951 (Pl. Exh. 1, R. 58) Mrs. Williams agreed that (R. 63):

"Subject to such water, flowage, riparian and other rights, if any, which the Virginia Electric and Power Company has in or on the above described lands. For a more particular description of said rights, reference is herein made to a deed from Falkland Estate, Incorporated, to Hannah N. Vaughan, dated October 20, 1920, . . . a deed from Hannah N. Vaughan to Middle Virginia Power Company, dated January 3, 1942 . . . a deed from Middle Virginia Power Company to Virginia Public Service Company, dated June 8, 1942 . . . and agreement of merger of Virginia Public Service Company with Virginia Electric and Power Company and order of transfer of property entered May 26, 1944. . . ."

the Government could acquire the right to flood the Falkland

---

[9] By this paragraph the fee owner retained rights of ingress and egress to and from the waters of the Dan River and the right to use the water for ordinary domestic purposes, bathing, boating and fishing. The evidence indicates that Mrs. Williams wished to retain similar rights when the Government was negotiating with her to obtain the right to flood the land above contour 321', the upper limit of respondent's flowage easement.

[10] See Def. Exh. H, R. 313 at 318, 319-320, 321.

tract up to contour 330′ for the sum of $1.00. The evidence showed that the "basic reason" for Mrs. Williams' agreement to accept this nominal compensation for the added servitude imposed by the Government's flowage easement[11] was her understanding that the Government would acquire the right to flood the land up to contour 321′ from respondent and that she considered the Government's infrequent flooding of the additional land on the bluffs between contours 321′ and 330′ "a comparatively small thing" (R. 301-302).[12] On several occasions before the option was given it was represented that the United States would acquire from the respondent its rights in the Falkland tract (Def. Exh. H, R. 313-323, 295; 296; Def. Exh. I, R. 324-325; 302).

There is no factual basis for the Government's statement that: "The United States initially proposed to condemn

---

[11] See R. 34, 50, 56, 57; 291-294; 321-322; Pl. Exh. 3, R. 159-161, esp. at 160-161; also Def. Exh. H, *supra*, at R. 316, 321 and 322. The Government's first brief in the court of appeals stated (at p. 9): "... the option agreement between the Government and the fee owner ... was made subject to the water rights of Vepco ..." and on page 30 thereof: "*The Government ... took from [the fee owner] and paid her only for the increased servitude, if any, imposed by this new flowage easement.*" The Government's petition to this Court, No. 41, O. T. 1956, said: "The fee owner ... agreed to convey to the Government *any flowage rights she may have retained*, for the consideration of one dollar (R. 71-82, App., 29)." (R. 226).

[12] Thus there is no factual basis for the Government's repeated statement that it was a "fortuitous circumstance that [the fee owner] Mrs. Williams desired to convey a flowage easement, rather than a fee, to the United States and that she deemed one dollar adequate monetary consideration because she wished to enjoy the benefits of having an artificial lake upon her estate" (Pet. Br. pp. 12 and 21). When the matter of benefits was submitted to the commissioners, the Government made no such claim, the evidence showed that there was no lake—only mud and marsh (Munger, R. 265-267) and the commissioners reported that based on the evidence and their personal observation the damages to the residue exceeded any special benefits (R. 99 at 100-101).

the fee title of this particular tract . . ." (P. Br. 5, see also 12 and 21). The Government's Project Manager, Buford, testified that in April 1950 the United States "had not definitely determined" to condemn the fee simple interest in the Falkland tract (R. 293) and the United States had not then determined "to ask for a fee simple interest" because the Corps of Engineers "had not investigated the Falkland tract". (R. 294, see also Def. Exhs. H and I, *supra*).[13]

Although the Government exercised its option (R. 97), the fee owner made no conveyance to the Government, and the United States elected to acquire its flowage easement by condemnation. At the outset, the Government conceded that it "acquired nothing" under the option agreement (R. 34, see Government's answer to respondent's interrogatory 6, R. 201 at 202, 203 at 204-205).

The Government's declaration of taking (R. 8), under which its flowage easement was acquired, was filed on October 23, 1952, under the style *United States of America v. 2079.72 Acres of Land, more or less, in the County of*

[13] The evidence further showed that, after the fee owner's offer was brought to the attention of the Corps of Engineers, it was estimated that the "fee value for the 1810 (sic) acres", which was then considered all the Government required, was at least $161,000 or $180,000. The Government's motive as stated by the Corps of Engineers was, "In view of the very substantial savings involved, it was considered to the best interest of the Government to accept the fee owner's offer [. . . to convey a comprehensive flowage easement . . . for $1.00 subject only to outstanding interest of the Power Company" (Def. Exh. H, *supra*, R. 313 at 316). In its first brief in the court of appeals dated September 1954, the Government explained that the practice of taking an easement rather than the fee was "not of recent origin" (p. 22) and that it was ". . . the policy of the Government to condemn only the minimum interest which it needs to accomplish its purpose and leave to the landowner as much of his property as possible. . . ." (pp. 25-26).

Halifax, Virginia, Olive Vaughan Williams, et al., and Unknown Owners. On the same day, the Government filed its complaint, under the same style, "for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest" (R. 1), describing the nature and purposes of the flowage easement taken by the Government (R. 4) and the land directly involved (R. 4-8).[11] Neither the declaration of taking nor the complaint nor the exhibits attached stated that the Government's flowage easement would be subject to respondent's rights in the Falkland Estate or that respondent's easement to flood most of the same land was excluded from the proceeding. In fact, respondent's rights were not mentioned and the Government deleted respondent's name from the complaint's list of owners and possible parties defendant "having or claiming, or who may have or claim an interest in the property" (R. 190).

However, in its complaint the Government recognized that there might be "others who would have or claim some *interest* in the property to be taken" and they were "made parties to this action under the designation 'Unknown Owners'" (R. 2; cf. R. 190). The Government served notice on respondent that the complaint had been filed, stating that "at the trial of the *issue of just compensation* . . . [respondent] may present evidence as to *the amount of compensation* to be paid *for the property in which [respondent had] any interest and* [that respondent] may share in the *distribution* of the award of compensation" (R. 191-192; cf. R. 194). Respondent filed notice of appearance claiming an interest

[11] Many other tracts lying in the 41 and 81 segments of the project were also included. Those matters were later settled and are not now involved.

in the Falkland tract and reserving the "right to contest the issue of just compensation" for the Government's easement thereon "and to appear and present evidence of value of [such property] and of [respondent's] interests therein at the trial of such issue. . . ." (R. 193).

At the first pretrial conference, respondent disavowed intention of claiming any element of value "based upon an integrated power property" (R. 41-42).[9] At the first trial respondent reaffirmed that it was making no claim based upon water power value or rights (R. 39, 54).[10] By agreement of the parties the district court heard the evidence. The uncontradicted testimony was (1) that in 1941 an engineering study had been made indicating a substantial economic value for respondent's flowage easement and other rights in the Falkland tract and other properties,[10] (2) that prior to the Government's construction of the Kerr Dam and Reservoir, respondent's "perpetual right to flood this area . . . [had] value because of the demand for same . . . for hydroelectric purposes . . . for industrial development in the paper or chemical industries . . . [and for] area developments" (R. 44-45); and (3) that as of the date of taking the "minimum fair market value" of respondent's easement to flood permanently was "not less than the appraised value of

[9] Respondent took this position prior to *Twin City Power Co.* v. *United States*, 215 F. 2d 592 (4th Cir. August 30, 1954), which was reversed by this Court on January 23, 1956, 350 U. S. 222, because the respondent did not consider that, absent an integrated power site, it should assert any measure of value that would include water power value. But it does not follow, as petitioner's brief implies, that respondent's flowage easement had no value because respondent had "never assembled the lands necessary for an integrated dam site" (P. Br. 16, cf. 10).

[10] This study indicated a water power value of approximately $300,000, but respondent expressly stated that such value should not be considered (R. 39) and the engineering report was excluded upon the Government's objection (R. 40).

the land being flooded" (R. 42-43).[17] The foregoing amply supports the district court's statement: "I do not think there is any question that the [respondent's] rights had value. . . ." (R. 40).

The Government has never offered evidence indicating the contrary. Respondent submits that petitioner was in no position to challenge this because House Document No. 650, 78th Cong., 2d Sess., on the basis of which Congress approved the general plan for the comprehensive development of the Roanoke River Basin, including the Dan River (P. Br. 4), shows that in 1943 there were 18 privately owned reservoirs in the Roanoke River Basin used for various purposes, including condensing water for steam plants, processing water for industrial developments, water storage, recreation, and hydro-electric power.[18] House Document 650 recommended construction of 11 new projects, including one on the Dan River, and discussed others. One conclusion stated therein was (p. 58):

"It will thus be noted that the large electric utility

[17] At the outset, the Government, the respondent and the district court agreed that the original cost of respondent's flowage easement was not a proper consideration (R. 35-37, 284; but cf. 304-306). However, at the hearing on November 24, 1958, the Government reversed its position and urged that this "might . . . be considered 'one' test; 'one' admissible item" (R. 304). The United States documentary stamps affixed to the deed of October 14, 1925, conveying riparian and other rights in the Falkland tract and other small tracts immediately across the Dan River, including this flowage easement, to respondent's predecessor in title for the consideration of 9,500 shares of stock of Middle Virginia Power Company, indicate a consideration or value of approximately $65,000 (Def. Exh. C, R. 172 at 176). Although petitioner's brief recognizes that "the original cost of the easement is not the test", it insinuates that respondent was derelict because "if it were, the respondent would be faced with its failure to show what was originally paid for the flowage easements" (P. Br. 19, n. 7).

[18] See Table 8 of Review Report on Roanoke River, Va., and N. C., January 30, 1943, House Document 650 at page 19.

companies in this region have shown definite interest in the development of the potential water power resources of the basin. The construction of hydroelectric projects at the better sites in the basin was undoubtedly delayed by private interests because of the depression of 1929-1936."[19]

Thus, there is no factual basis for the Government's statements: ". . . the limited prospect that the easement might some day prove productive had terminated well in advance of the condemnation proceedings" (P. Br. 10) and ". . . respondent's rights were not . . . valuable and had in practical effect expired before the date of condemnation. . . ." (P. Br. 12).

Based on uncontradicted expert testimony that the fee simple value of the 1540 acres valued as a separate tract, *standing alone*, and with all merchantable timber removed was $40 or $45 an acre (Harvie, $40, R. 30-31; Clark, $45, R. 26-28), the district court, upon the theory that the value of respondent's easement to flood permanently 1540 acres was not less than the fee value of the land which would be flooded (R. 43, 48-49), adopted the lower valuation and entered judgment for $61,600[20] (R. 23-57; 72-74; 220-225).

---

[19] See, e. g., *Chapman, U. S. ex rel. v. F. P. C.*, 345 U. S. 153 (1953).

[20] On this basis the Government was not required to pay the full fee value of the 1540 acres as a part of the Falkland tract, for both of respondent's appraisers testified on cross-examination that if they had appraised that land as a part of the 7400 acre Falkland tract the fee value would have been "substantially more" or "much greater" (R. 28-30; 31-32). This was borne out at the second trial when the value of the entire 7400 acre tract, including the areas that were subject to the Government's and respondent's respective easements was the issue (R. 104-138; 244-268). There is, therefore, no justification for the Government's comparison of the results of the first and second trial (P. Br. 8), which, respondent submits, gives the erroneous impression that the second award, now under review, which was determined upon an entirely different basis from the first was "equated with" or "equivalent to [the] fee value" of the servient land (see P. Br. 9, 11, 12, 16, 19 and 22).

Upon the appeal which followed, the court of appeals in a decision by Chief Judge Parker denied the Government's contention that respondent's easement to flood had no value upon the authority of its decision in *Twin City Power Co.* v. *United States*, 215 F. 2d 592 (4th Cir. 1954). The court also rejected *the Government's contention* that in any event the Government was not liable for the fee simple value of the land, *but only for the difference in value of the servient land before and after the taking of the Government's easement*. 218 F. 2d 524, 525, (R. 76); see also 370 F. 2d 707, 709; (R. 330-331; and R. 55).[1]

Upon remand by this Court for further consideration in the light of *United States* v. *Twin City Power Co.*, 350 U. S. 222 (350 U. S. 950), the court of appeals held, in an opinion by Chief Judge Parker, that respondent's right to compensation was not foreclosed by the *Twin City* decision. 235 F. 2d 327, 329, (R. 79-80). But agreeing with the Government's contention, at that time, that compensation should be determined on the basis of the Government's flowage easement, which would flood a part of the land only intermittently and therefore, *"would not destroy the entire value of the land for agricultural or grazing purposes"*, 235 F. 2d 327, 330, (R. 81), the court of appeals remanded the case to the district court for further proceedings. The Government filed a petition for rehearing in which it reversed its position and urged that *only* respondent's ease-

[1] Then the Government contended that only its easement should be valued because it would cause less damage than respondent's since the Government would flood the land intermittently and portions thereof, infrequently; also that there would be special benefits to the remainder (R. 55; compare the Government's counsel's hypothetical questions on cross-examination, R. 29-30 and 31-32). The Government now takes the opposite position. (U. Br. 17, n. 5).

ment should be valued since, according to the Government, it had made settlement with the fee owner. The court of appeals rejected these arguments because this was an *in rem* proceeding 237 F. 2d 160, (R. 82-83).

Upon remand the district court proceeded with the determination of compensation in accordance with the mandate from the court of appeals (R. 229-233 and 83). Commissioners were appointed and directed to find and report the difference between the fair market value of the 7400 acre tract before and after the imposition of the Government's easement described in the Government's complaint (Exhs. B and A, respectively, order appointing commissioners, R. 86, 88-89; Exh. B, R. 235; Exh. A, R. 231; see Exh. D to complaint, R. 1 at 4-6, and Exh. C, R. 4; and Schedule A and paragraph 3 (b) of the declaration of taking, R. 8 at 10-14 and 9-10) as follows (R. 235):

> The full, complete and perpetual right, power and privilege to overflow *permanently* or *intermittently*, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir, Tract No. FF-3100E, Pars. A, B, C, D, E and F, together with the right, power and privilege to go upon the lands involved from time to time as the occasion may require to accomplish any activities in connection with the maintenance and operation of the John H. Kerr Dam and Reservoir and to remove from said lands natural or artificial structures or obstructions which, in the opinion of the representatives of the United States in charge, may be detrimental to the maintenance and operation of said project, reserving, however, to the owner(s) and their assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements acquired by the United States, subject, however,

to existing easements for public roads and highways, for public utilities, for railroads and for pipelines."

The Commissioners were required to take into consideration the resulting benefits, if any (R. 89).[1] Twice the district court admonished the commissioners to "exclude from their valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream" (R. 90, also R. 86 at 88-89). The commissioners were also instructed not to include the value of any timber on the 1840 acres subject

[1] The Government now insists, for the first time that this easement is more burdensome than respondent's easement to flood because the former "was for the much broader purpose of a 'flood control project and other purposes incident thereto' (R. 3, 9) *including 'substantial benefit to navigation'* " (P. Br. 17, n. 5). This is contrary to the Government's previous position (1) at the first trial in connection with the district court's refusal of the Government's offer of proof concerning frequency and extent of flooding, which did not mention navigation and made no attempt to distinguish between flooding for flood control and flooding for navigation (R. 49-50) and (2) before the court of appeals (*see supra*, p. 11, n. 2), and 218 F. 2d 524-525; R. 75 at 76; and 270 F. 2d 707-709; R. 329 at 330-331). The foregoing description of the Government's flowage easement, which is the same as that stated in its declaration of taking and petition makes no such distinction.

As to the Government's alleged "substantial benefit to navigation" (P. Br. 17, n. 5), it appears from the report of the Chief of Engineers in House Document 650, 78th Cong., 2d Sess., that no value was assigned for benefits from navigation and the plan for the project envisioned only "aid in the future extension of the existing navigation project to Weldon, N. C. should such extension be found to be warranted in the future" (pp. 79 and 88).

[1] 33 U.S.C. § 595, which is applicable here by reasons of the provisions of 33 U.S.C. §§ 591 and 701c-2 (R. 3, 9), requires that the tribunal determining the "compensation or assessing the damages to the owner, whether for the value of the part taken or for any injury to the part not taken shall take into consideration by way of reducing the amount of compensation or damages any special or direct benefits arising from the improvement. . . ."

to the Government's flowage easement.[4] The district court propounded four inquiries to the commissioners. The first stated the issue of compensation as stated in the pleadings, without regard to respondent's easement. The second inquiry took into consideration the fact that respondent's easement would flood the same land as the Government's only up to contour 321'. The third and fourth inquiries, proposed by the Government (R. 85-86), restricted the commissioners to a consideration of only the 1840 acres to be flooded by the Government, without regard to the remainder of the 7400 acre tract.

At the hearings before the commissioners, the Government offered no evidence of value, the frequency of extent of flooding, or the resulting benefits it previously asserted.

Respondent's appraisers testified that the highest and best use of the land was for agricultural, grazing and timber purposes. These witnesses did not agree in their valuations or in their estimates of the *difference* in value before and after the taking of the Government's flowage easement. The depreciation assigned by the experts did not equal the fee values except the land (890 acres) which the evidence showed, and the Government conceded, would be totally destroyed.[5] The commissioner's findings were substantially less than had been assigned by the witnesses. Thus, there is no basis for the Government's statements that the commissioners' determination of compensation or the amount there-

[4] With the consent of the Government, the fee owner had sold this timber and it had been cut and removed. Its value was not considered in any of the valuations made in this case (R. 26-28, 30-31; 90, 101 and 138). Thus, there is no basis for the innuendo in petitioners's brief p. 17, n. 6 that respondent was paid nothing for the timber on the Fall land tract.

[5] A condensed table showing the experts' value and depreciation and the commissioners' findings is printed in App. p. 1. Note that valuations were less than 100% of the fee for all land above Contour 302'.

of allocated by the district court to respondent was "*equivalent* to fee value" or can be "*equated* . . . with the value of the servient fee." (P. Br. 9, 16, 19 and 22).

The commissioners filed a unanimous report answering the district court's four inquiries in the manner required by its order and instructions. In addition, at petitioner's request, they reported the amount of damage to the residue included in their findings (R. 101-102, 104). The commissioners found that the residue had been damaged "beyond any peculiar benefits that might accrue to such property from the acquisition of the easement by the United States and converting it to its uses" (R. 100-101). Excluding any element of value arising from the availability of the land for water power purposes, the commissioners determined that $70,920 was the just compensation for the Government's flowage easement over 1840 acres of the 7400 acre tract (R. 101).

The Government filed no objection to the commissioners' report as required by Fed. R. Civ. P. 53(e)(2) but later filed a motion to exclude from "any award of just compensation to the defendants (sic) herein any element of compensation based on damages to the residue of the land involved" (R. 139-140), on the theory that the Government had settled for such damages with the fee owners. The district court permitted the Government to introduce the evidence it had proffered (R. 141) regarding its negotiations with the fee owners, and respondent introduced additional evidence on this subject. (R. 141-142, Pl. Exhs. 1 through 7, R. 158-165, 312, 290-291, and 298; R. 292-307 and Def. Exh. H, R. 313, 324 and Def. Exh. I, R. 324-325).[5] Mrs. Wil-

[5] At the first trial on January 18, 1954, the district court sustained the Government's objection that any such evidence was immaterial (R. 32-35, 55; see also Government's answers to respondent's Interrogatory 6, R. 201 at 202; 203 at 204-205).

liams' attorney, who handled all her negotiations with the Government, testified that Mrs. Williams intended to agree to convey to the Government only the additional flowage rights about contour 321' and that because of her option contract with the Government she was not claiming any portion of the compensation for the Government's flowage easement.[7] Whereupon, the district court overruled the Government's motion, holding that when respondent's predecessor in title acquired its flowage easement over 1540 acres of the 7400 acre tract it had made compensation for the resulting damages to the residue, which were expressly included in the grant (see Def. Exh. C, R. 172-176 at 176), and, respondent's share of the compensation for the Government's taking should reflect this damage (R. 148-149). The Government made no claim in the district court that respondent was being compensated for grazing and agricultural rights which it did not have. The Government did not attempt to claim that by virtue of the option agreement or its release clause, it stood in Mrs. Williams' shoes and could assert her rights to challenge the court's allocation to respondent. The district court determined that the value of respondent's interest was the difference, as found in response to the second inquiry, between the fair market value of the 7400 acre tract before and after the imposition of the Government's easement on the 1540 acres included in respondent's easement and, accordingly, entered judgment for $65,520, of which sum $11,720 represented the damage to the residue of the tract (R. 143-150, esp. 149).

Mrs. Williams made no claim to any part of the compensation for the added servitude imposed upon the land, and she

[7] Mrs. Williams took the same position at the first trial (R. 37).

did not contest either respondent's right to be paid or the amount of its share of such compensation.[28]

On the Government's second appeal the court of appeals affirmed. In an opinion by Judge Soper, the court emphatically rejected the Government's contention that respondent had received compensation on the theory that it possessed the right to use the land for agricultural, grazing or forestry purposes and held that the market value of respondent's easement included damages to the residue. 270 F. 2d 707, (R. 329-338).

SUMMARY OF ARGUMENT

1. Respondent's perpetual and exclusive easement to flood riparian land was a property interest for which respondent is entitled to compensation when it is extinguished by eminent domain proceedings in which the United States acquires an easement to flood the same land. This property interest is not a water right and should be distinguished from riparian water rights

[28] The Government's brief would indicate that the settlement with the fee owner was an accomplished fact. That is misleading because as yet no order has been entered for the payment to the fee owner of the agreed consideration of $1.00 for her interest, although the Government's attorney prepared a sketch thereof (R. 285). It should also be noted that the flowage easement in the option contract with Mrs. Williams was more limited than the easement taken by the Government in that the former did not include the words "permanently or intermittently." Compare Plf. Exh. 1, at 58. Thereafter Mrs. Williams and the United States entered into a stipulation limiting the interest taken to the exact language in the option contract (See R. 204). The stipulation did not, of course, have any effect upon the subsequent proceedings because the filing of the declaration of taking irrevocably committed the United States to payment of the ultimate award on that basis. *See United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163 at 164-165 (7th Cir. 1943); *United States* v. *Carey*, 143 F. 2d 445, 450 (9th Cir. 1944); *Sanchez* v. *Crichton*, 147 F. 2d 430, 435 (5th Cir. 1945); *United States* v. *0.71 Acres of Land, etc.*, 148 F. 2d 618, 620 (5th Cir. 1945); also Rule 70A(i)(3) Fed. R. Civ. P.

which are subordinate to the rights of the Government. The existence and value of such an easement was not contingent upon the use of the water in the stream or a license to build a dam. Compensation for this property, excluding any element of value arising from the availability of the land for water power purposes, has not been foreclosed by *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), *United States* v. *Chandler Dunbar Co.*, 229 U. S. 53 (1913) or *United States* v. *Grand Dam Authority*, 363 U. S. 229 (1960). The Government's argument that such property interest is not compensable in a taking by the United States because of the Government's paramount navigation servitude is an improper extension of the foregoing decisions and is contrary to *Pumpelly* v. *Green Bay & M Canal Co.*, 13 Wall. 166 (1872), *United States* v. *Cress*, 246 U. S. 316 (1917), and *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 798 (1950). If the Government's contentions were followed to their logical conclusion the Government would get something for nothing.

2. In an *in rem* proceeding the Government acquires a new title against all the world and compensation for the *res* taken is determined without regard to the various ownerships or interests in the servient land. The *res* valued is the Government's flowage easement and the measure of compensation therefor is the difference in value of the servient land before and after the taking of that easement, excluding any element of value arising from the availability of the land for water power purposes. Compensation for the Government's flowage easement was determined in unassailable fashion.

3. After the compensation for the *res* taken has been fairly determined, the condemnor has no standing in further

proceedings in the district court for the distribution of this compensation between the owners of various interests or estates in the land. But if it did, in the instant case the district court correctly determined the share of the compensation for the Government's easement which should be paid to respondent for the extinguishment of its flowage easement by the Government's taking.

ARGUMENT

Introduction

Although the petitioner avoids saying so categorically, the implications of the arguments in petitioner's opening brief are that respondent had nothing of value as far as the United States was concerned and, therefore, was not entitled to any compensation. Respondent's position is that it owned a valuable property interest for which it was properly compensated in an *in rem* condemnation proceeding by the United States. Thus, the contentions of the parties boil down to a consideration of what respondent owned and what, if anything, should be paid when its interest was extinguished by eminent domain proceedings by the United States. As Judge Sofer has pointed out, what the Government is really trying to do in this case is to get something for nothing.

I.

Respondent Was Entitled to Compensation for Its Easement to Flood

It is clear from the foregoing statement of the case that on the date of the taking respondent owned, *inter alia*, a perpetual and exclusive easement to flood permanently 1540

acres of the 7400 acre Falkland tract, without further payment for damages to the area flooded or to the residue of such land.[29] The evidence shows that this property interest, which had been obtained by express grant, had not been extinguished by non user.[30] Respondent's easement to flood was not a water right.[31] It was a transferable, commercial easement in gross with inherent value.[32]

The value of an easement is not diminished by the owner's inability to exercise it. *See Boom Company v. Patterson*, 98

[29] Stipulation of facts, R. 67-70, 166; Exh. 3, R. 172-176; *see* 3 POWELL, REAL PROPERTY, § 405 (1952); RESTATEMENT, PROPERTY, § 486.

[30] *Lindsey v. Clark*, 193 Va. 822, 525, 70 S. E. 2d 342, 344 (1952); driveway); *Norfolk & Western Ry. Co. v. Peckham*, 107 Va. 500, 509, 59 S. E. 404, 407 (1907) (right of way for water race); 3 POWELL, REAL PROPERTY, § 423, n. 20 (1952).

[31] "The recognition of the important differences between those law-created relationships [water rights and other 'natural rights'] and prescriptive easements reaches back to the time of Bracton [fol. IV, f. 221a, . . .]" 3 POWELL, REAL PROPERTY, § 404 n. 8 (1952).

[32] Easements in gross and appurtenant by definition, both have servient tenements, but with the easement in gross the servitude imposed runs in favor of a specific legal person, rather than the parties in possession of the dominant tenement. E.g., *Stokes Orchard v. Manley*, 194 Va. 339, 344, 73 S. E. 2d 390, 393 (1952). By statute in Virginia, an easement in gross is an "interest in land" conveyable by deed or will. Va. Code Ann. § 55-6 (Repl. Vol. 1950); *Richmond v. Richmond Sand Co.*, 123 Va. 1, 96 S. E. 294, 297 (1918). Common-law decisions in other jurisdictions, however, to the effect that easements in gross are not assignable have led to their reclassification as "non-commercial" and "commercial", the latter being accorded full assignability. RESTATEMENT, PROPERTY, § 489. Along with pipeline and railroad rights of way, easements to flood fall into the commercial class, since "the use authorized . . . results primarily in economic benefit rather than personal satisfaction." *Ibid.* at comment *e*.

Assignability of easements in gross used for profit has also received direct encouragement from the courts in recognition of the social interest in permitting a market for commercial property interests. Assignable easements in gross capable of producing a financial benefit to the owner have a sale value. 2 AMERICAN LAW OF PROPERTY § 8.83, p. 291, 295, n. 1 (Casner ed. 1952).

U. S. 403, 407-410 (1878); *Olson* v. *United States*, 292 U. S. 246, 255-256 (1934); *United States* v. *Miller*, 317 U. S. 369, 373-375 (1943); and *United States* v. *Dickelson*, 138 F. 2d 343, 345 (4th Cir. 1943), *cert. den.* 321 U. S. 773 (1944). The value of respondent's easement to flood was not extinguished by the adoption and announcement of the Government's plan for the construction of the Kerr Dam and Reservoir (LEWIS, EMINENT DOMAIN, §707 p. 1283 (3rd ed. 1909); see *Boom Co.* v. *Patterson*, *supra*; *Shoemaker* v. *United States*, 147 U. S. 283 (1892); *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 70, 77, 78 (1913). And the Chief of Engineers recognized this when he directed the Division Engineer to prepare the proposed option contract with Mrs. Williams (R. 318):

> "Since the perpetual right to flow, permanently and/or intermittently, must be acquired over the entire area of approximately 1,810 acres, such right must also be obtained from the Virginia Electric Power Company, Inc. jointly, in the event of sale by the Vaughan Estate, or by separate transaction."

Instead of obtaining a conveyance from respondent or from Mrs. Williams, the government instituted this *in rem* proceeding in which respondent's property interest was extinguished. Its value did not disappear at the moment of the Government's taking. *See Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 337, 338 (1893). The Government cannot be heard to argue that "the ice values remained in" Mrs. Williams (U. Br. 19), which she has waived in several ways, or contend that all respondent had was "a cloud on" title, for which a purchaser would pay a nominal consideration for its removal (U. Br. 12, 21).

Respondent's easement to flood the land was not a water right (see 1 FARNHAM, WATERS AND WATER

RIGHTS, c. V, §§62-75, pp. 278-347, *passim* (1904)) subordinate to the Government's right to improve navigation, etc. (1 FARNHAM, *op. cit.* c VI, §79b, p. 380). This is sound doctrine and the distinction has been recognized by this court (e.g. *Pumpelly* v. *Green Bay & M. Canal Co.*, 13 Wall. 166 (1872); *United States* v. *Cress*, 243 U. S. 316 (1917); and *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 798 (1950)); see 1 FARNHAM, *op. cit.* c VI, §79a, pp. 377-379. The court below recognized this important distinction when it said 270 F. 2d 707, 711, (R. 333):

> "Although it is true that the Power Company could not use the waters of the stream for power purposes except with the approval of the United States, it is equally true that neither the United States nor anyone else could use the land in connection with the stream as a power site so long as the Power Company possessed the flowage easement acquired from the owner of the fee."

The Government's principal argument is that in a taking by the United States the extinguishment of respondent's private property right to flood the land is not compensable because of the Government's paramount navigation servitude, even though respondent's interest in the land is not a usufructuary water right. As respondent views it, this is an improper extension of the doctrine of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53 (1913) and *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956). Petitioner erroneously asserts that "what respondent actually seeks—though in deference to this Court's decision in *United States* v. *Twin City Power Co.*, 350 U. S. 222, it avoids the formulation—is value for its interest in land *predicated* upon the utility of that property interest in conjunction with a power

project." (P. Br. 15) Eight judges on two federal courts of appeal have refused to ignore this distinction. Speaking for himself, Circuit Judge Soper and District Judge Bryan, Chief Judge Parker said 235 F. 2d 327, 329, (R. 79-80):

> The holding of the Supreme Court in the Twin City case was that the availability of land on a navigable stream as a site for water power development could not be considered as an element of value in assessing damages on a taking by the government. Nothing in the opinion holds that compensation must not be made for other elements of value; and the case was expressly distinguished from *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 798 where, as here, "assertion of the dominant servitude in the navigable river injured property beyond the bed of the stream." See 350 U. S. at 225. In taking the flowage easement over the 1540 acre tract here involved, therefore, the government must make compensation on the basis of the difference in the value of the land with and without the easement taken on the principle that "the destruction of privately owned land is 'a taking' to the extent of the destruction caused." *United States* v. *Kansas City Life Ins. Co.*, *supra*, 339 U. S. 799, 809-810. Availability as a site for water power development must be excluded from consideration in making this valuation; but other elements of value not related to the flow of the stream, such as its value for agricultural or grazing purposes, can properly be considered. The amount thus determined must be paid into court by the government as compensation for the taking and must be awarded by the court to those having an interest in the land in accordance with their interest. The condemnation suit is a proceeding in rem. The owners of the res are entitled to have the compensation divided among them according to their interests in the res taken.

Later, when the flowage easements of the Twin City

Power Company were under consideration, Chief Judge Parker, writing for Circuit Judges Soper, Haynsworth and himself, held that flowage easements were compensable and remanded the case to the district court for evaluation according to the formula prescribed in the instant case. *United States* v. *Twin City Power Co.*, 248 F. 2d 108-113-114 (4th Cir. 1957), rehearing denied, 248 F. 2d 114-115; *cert. den.* 356 U. S. 918 (1958).

When the instant case was next before the court, Judge Soper, writing for himself, Circuit Judge Haynsworth and District Judge Thomson (270 F. 2d 707; R. 329), again rejected the Government's argument that compensation for respondent's flowage easement had been foreclosed by this Court's decision in the *Twin City* case.

The court of appeals for the Fifth Circuit has also rejected this contention, *United States* v. *Augusta Power Co.*, 278 F. 2d 1 (5th Cir. 1960),[33] citing and quoting extensively Judge Parker's second opinion in this case. Therefore, it is proper to say that the Government's syllogism in this case is as specious in law as it is in fact.

Contrary to the Government's contention, respondent's property interest in land has been extinguished. It is also true that respondent's expectancies have been frustrated, but respondent has not received any compensation or element of value "for the frustration of a business hope and expectancy . . ." (P. Br. 10, cf. 15-16). A property interest and a business expectancy are different and distinct, as was pointed out by this Court in *United States* v. *Grand River Dam Authority*, 363 U. S. 229, 236 (1960) where it said:

[33] Although the Government's supplemental memorandum to its petition for certiorari in this case, No. 757, O.T. 1959, pointed out that there was a conflict between the Fourth and Fifth Circuits regarding the measure of value of a flowage easement, the Government's opening brief does not mention this point.

> "The Court of Claims erred in failing to distinguish between an appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power."

See also, *Brooklyn Eastern District Terminal* v. *City of New York*, 139 F. 2d 1007, 1011-13 (2d Cir. 1944), *cert. den.* 322 U. S. 747 (1944).

On the contrary, we are concerned here with the value of an interest in land to which the United States had no right and which was not subservient, in any respect, to the Government's paramount navigation servitude. No one would contend that the United States or the holder of a federal license to dam the Dan River or the Roanoke River, of which the Dan is a tributary, would thereby have the right to flood the land of the Falkland tract up to contour 321′ without payment. Certainly the Government's paramount navigation servitude does not extend that far.

Respondent asked and has been awarded the same compensation, excluding water power value, it would have been entitled to receive for its easement to flood the Falkland tract up to contour 321′ had it been acquired or extinguished in a similar condemnation proceeding by a private power company holding a federal license to build a dam. The Government has not and cannot deny this. As far as we know, there is no double standard permitting a different measure of compensation for flowage easements when the United States is the condemnor. *United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266, 278, 284 (1943); see also *United States* v. *Cress*, 243 U. S. 316, 319, 326, 329, 330 (1917).

If easements to flood are worthless as a matter of law when taken by the United States, it would follow that when the Government took such an easement from the owner of

an unencumbered tract of land, the owner would lose nothing and hence would be entitled to no compensation. Obviously such a result is untenable and therefore the theory must be unsound. Furthermore, if the Government were upheld here, in the future, it could first acquire the flowage easement for nothing and then deal with the owner of the underlying fee. The evidence here suggests that if the Government had acquired respondent's easement first and then proceeded against the owner of the fee, she would have been entitled only to damages for the added servitude. The Government's contention that in tracts subject to private easements to flood, the value remains in the fee owner, is not only incorrect, but would produce the inequitable vice of paying the fee owner twice, first when the easement is conveyed to the private owner and second when it is acquired by the Government. Contrary to the obvious expectations and intent of both the fee owner and the grantee of the easement to flood for a substantial consideration, the latter would get nothing and the former would receive a windfall.

II.

Compensation for the Government's Flowage Easement Was Correctly Determined

The pleadings show that this was a proceeding *against the land itself*, without specification of the ownership of interests therein, to acquire the right to overflow land, subject only "to existing easements for public roads and highways, for public utilities, for railroads and for pipelines" (R. 235).

Although the Government had an option agreement with Mrs. Williams, it was expressly subject to respondent's easement to flood, and the Government recognized that a conveyance from Mrs. Williams in accordance with the terms of the option contract would not have conferred on

the Government all the rights necessary for its flooding of the 1840 acres of the 7400 acre tract.

But the Government did not obtain a conveyance from either Mrs. Williams or respondent. Instead it proceeded *in rem* against the land itself and by so doing acquired its easement irrespective of the different ownerships and precluded the possibility of paying twice or paying the wrong person. *United States* v. *Dunnington*, 146 U. S. 338 (1892); Annot. L.R.A. 1917A, p. 690.

By so proceeding the United States acquired a new title interest and extinguished all previous interests in the tract inconsistent with the rights it had taken. In such a proceeding just compensation is fixed without regard to the various ownerships in the land, and the parties with interests therein are left to divide such compensation by agreement or by the adjudication of the value of the respective interests by the district court. *United States* v. *Dunnington, supra; Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893); *United States* v. *Welch*, 217 U. S. 333, 339 (1910); *United States* v. *Petty Motor Co.*, 327 U. S. 372, 376 (1940); *Duckett & Co.* v. *United States*, 266 U. S. 149 (1924).[34]

In the *Duckett* case, *supra*, Mr. Justice Holmes, writing for the Court, said: ". . . the accurate view would seem to be that such an exercise of eminent domain founds a new title and extinguishes all previous rights." 266 U. S. at 151.

---

[34] Other authorities supporting this proposition are: *Meadows* v. *United States*, 144 F. 2d 741 (4th Cir. 1944); *Cullen & Vaughan Co.* v. *Bender Co.*, 122 Ohio St. 82, 170 N. E. 633; *United States* v. *25,936 Acres, etc.*, 153 F. 2d 277, 279 (3d Cir. 1946); *Eagle Lake Improvement Co.* v. *United States*, 160 F. 2d 182, 184 (5th Cir. 1947), cert. denied sub nom.; *Humble Oil & Ref. Co.* v. *United States*, 332 U. S. 762 (1947); *Burkhart* v. *United States*, 227 F. 2d 659, 662, 663 (9th Cir. 1955); Annot., 69 A. L. R. 1263, *supp.*, 166 A. L. R. 1211 (1947); 4 NICHOLS, EMINENT DOMAIN, §12.36[1], p. 144 (3d ed. 1951); 2 LEWIS, EMINENT DOMAIN, §716, p. 1253 (3d ed. 1909).

Thus it is clear that respondent's property right was extinguished in this proceeding.[35] The condemnor's agreement to pay compensation to one of the owners of an interest therein does not affect the rights of other claimants. *Duckett & Co.* v. *United States, supra,* 266 U. S. at 151; *United States* v. *Petty Motor Co., supra,* 327 U. S. at 374.

The compensation for the flowage easement the Government has taken from the land itself is measured by the difference in value of the servient land before and after the taking. *Olson* v. *United States,* 292 U. S. 246, 253, 255-257 (1934); *Karlson* v. *United States,* 82 F. 2d 330-337 (8th Cir. 1936); *United States* v. *Miller,* 317 U. S. 369, 374-375 (1943); *Slattery Co.* v. *United States,* 231 F. 2d 37 (5th Cir. 1956) *cf. United States* v. *Cress,* 243 U. S. 316 (1917).[36]

The court of appeals recognized the importance of this aspect of the case on two different occasions. Because this was an *in rem* proceeding, it rejected the Government's contentions (1) that the Government's flowage easement was only an additional or second easement upon the land; (2) that the Government's settlement with the owner of the fee affected respondent's rights; and (3) that respondent's flowage easement to flood, rather than the easement taken by the Government, was all that should be valued. 235 F. 2d 327, 329; 237 F. 2d 165, 166. Although petitioner's brief does not argue that the court of appeals was wrong

[35] See Restatement of Property § 507, p. 3092.

[36] In the United States Army Corps of Engineers *Real Property Appraisers' Handbook* (U. S. Government Printing Office, October 1955) it is said (at page 34): "In valuing flowage easements, appraisals of the fair market values of two distinct estates are required: the entire land tract before imposition of the easement and the entire land tract after imposition of the easement. *The difference between the appraisals of the two estates represents the damages, or the value of the easement.* See also Saxon, *Appraising Flowage Easements,* The Appraisal Journal, October 1956, p. 490 ff.

in this, the petitioner continues to make substantially the same arguments which were rejected by the court of appeals as having no relevancy or bearing in an *in rem* proceeding, such as (1) the Government has taken only "a flowage easement from the fee owner" (P. Br. 9 cf. pp. 11, 20) and (2) that "nothing valuable was taken from respondent when the United States obtained an easement from Mrs. Williams . . ." (P. Br. 20). It should be noted again that under the pleadings the Government's flowage easement was not subject to respondent's easement, nor was it imposed upon respondent's easement, nor was it co-extensive with respondent's easement.

III.

The United States Has No Concern With the Distribution of the Award

Where the condemnor has paid into court just compensation for the property taken in an *in rem* condemnation proceeding, it has performed its duty and no matter how large or diverse are the claimants to the fund, its distribution is not any concern of the condemnor. *United States* v. *Dunnington*, 146 U. S. 338, 352-353 (1892); *City of St. Paul* v. *Certain Lands, etc.*, 58 F. 2d 805, 807 (8th Cir. 1931); *United States* v. *Certain Lands in Borough of Brooklyn*, 129 F. 2d 577 (2nd Cir. 1942); *Meadows* v. *United States*, 144 F. 2d 751, 752-753 (4th Cir. 1944).[37]

---

[37] Other authorities on this point are: *United States* v. *19,573.59 Acres of Land in Cheyenne County, Nebraska*, 70 F. Supp. 610 (D. Neb. 1947), *aff'd sub nom. State of Nebraska* v. *United States*, 164 F. 2d 866 (8th Cir. 1947), *cert. den.* 334 U. S. 815 (1948); *United States* v. *Adamant Co.*, 197 F. 2d 1, 5 (9th Cir. 1952); 2 NICHOLS, EMINENT DOMAIN, § 5.3[4], p. 51 (3rd ed. 1950); 4 NICHOLS, *op. cit. supra*, § 12.42[2], p. 172; Annot. L. R. A. 1917A, p. 690; Rule 71A(c), F. R. C. P.; 3 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 1519, p. 554 (Rules ed.).

It would seem under the foregoing authorities that the government has no standing to contest respondent's right to a portion of the award or the amount respondent should receive for its extinguished easement to flood most of the same land. This should end the Court's inquiry in this case.

Nevertheless, respondent will answer briefly petitioner's arguments upon this phase of the case.

IV.

The Allocation for Respondent's Easement Was Proper

Respondent's extinguished easement was perpetual and exclusive. It was an assignable or commercial easement in gross under the terms of the grant (Def. Exh. C, R. 172). Its value was, as the courts below held, the difference in the value of the servient tenement. 3 POWELL, REAL PROPERTY, § 426, p. 507 (1952); Restatement, Property, § 508, com d. The commissioners did this, under the district court's second inquiry, and their finding was approved and adopted by the district court. Because of the *in rem* feature of the case, that evaluation assumed that the Government's flowage easement was co-extensive not only in area but in nature (interimittent as contrasted with permanent flooding). The "before and after" method included, of course, the damages as well as the special benefits, if any, to the residue. This procedure was proper because respondent's easement was viable and could have been exercised by the Government according to its terms upon acquisition. Compensation is determined on the basis of the rights acquired and not according to the use actually intended.[38] This

[38] See Annot. 75 A.L.R. pp. 855-71; *cf.* Annot. 7 A.L.R.2d pp. 394-407.

method is consistent with the cases where an easement appurtenant has been extinguished. E.g., *United States* v. *Welch*, 217 U. S. 333 (1910). The case of *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189 (1910) (P. Br. 12, 21) cannot be related to the instant case for there the city's condemnation of a private way in order to make it a public way did not materially affect the dominant tenement. Here respondent's easement was totally destroyed. *Roberts* v. *New York City*, 295 U. S. 264 (1935), does not support the proposition for which it is cited by petitioner (P. Br. 11, 18). There this Court held that no additional compensation should be paid for the interests of the elevated railroad, that was abandoning its operation on the streets in question, because they were "*not* easements in gross assignable to strangers generally . . . [but merely] a release from liability from past and future damages." 295 U. S. at 280-1.

The important matter here is that as far as the underlying fee owner was concerned, she approved of respondent's participation in the award and the amount thereof. She regarded respondent's easement, as did the courts below, as "transferring to [respondent] the right to the compensation awarded for the flowage rights condemned by the government". 235 F. 2d 327, 330 (1956). (R. 81).

Petitioner has advanced no argument that either the courts below or Mrs. Williams was wrong.

With regard to petitioner's argument that respondent has received "fee values" which did not belong to it, we have already demonstrated that this is not factually correct. Further, respondent submits the valuation of respondent's easement by the "before and after" method was fair and accords with established principles.

The Government's analogy to proceedings under the Tucker Act (P. Br. 22) affords it no comfort. The court below rejected this argument as well and petitioner has

not advanced any reason indicating that the court erred. Petitioner's argument is based upon the erroneous premise that the procedure under the Tucker Act would be different from that followed in the instant case. In *Jacob's* v. *United States*, 290 U. S. 13, 16 (1933) this Court said: ". . . the fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim." See also *United States* v. *Dow*, 357 U. S. 17 (1958); *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932); *United States* v. *Cress*, 246 U. S. 316 (1917) and *United States* v. *Dickinson*, 152 F. 2d 865 (4th Cir. 1946), aff'd 331 U. S. 745 (1947).

Respondent cannot entertain seriously the Government's reiteration of its previous arguments to the effect that respondent was not entitled to any value attributable to the damages to the residue. The amount of such damages was $11,720. The Government has never suggested a remittitur for that amount. Furthermore, all of the cases the Government cites (P. Br. 24-25) were all considered by the court below and held to be inapposite because ". . . the Falkland tract . . . was held in single ownership by Mrs. Williams subject to the Power Company's easement."; and, further, that ". . . the market value of the interest of the Power Company may nevertheless be measured by what it would cost to acquire it, and this necessarily includes not only the value of the land for agricultural and forestry purposes but also the damages to the remainder of the tract." 270 F. 2d 707, 713-714; R. 337-338.

CONCLUSION

In this case the Government has been required to pay less than it would have had to pay in an ordinary case for the acquisition of a flowage easement. Simply because there was

a previous conveyance of an easement to flood does not justify the Government's acquiring its flowage easement for nothing.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

GEORGE D. GIBSON
RALPH H. FERRELL, JR.
FRANCIS V. LOWDEN, JR.
PERKINS WILSON

TABLE OF VALUATIONS AND COMMISSION'S FINDINGS

Witness:	Inquiry Number ‡	Fee Value/Depreciation Per Acre: Below 302' (890 Acres)* "Blue" †	Between 302' & 321' (650 Acres) "Yellow" †	Between 321' & 330' (300 Acres) "Salmon" †	Above 330' (5560 Acres) "White" †	I Value Before Taking 7400 Acre Tract	II Value After Taking 7400 Acre Tract	III Just Compensation: Difference in Value Before and After Taking	"Damages to Residue" Included in Column III
Clark:									
(R. 104-23; Tr. 74-78¶)	1	$45 and $70/100%	$70/75%	$50/30%	$55 and $70/5%	$644,690.25	$518,220.25	$126,470.00	$27,274.75
	2	45 and 70/100%	70/75%	50/5%	55 and 70/5%	644,690.25	521,970.50	122,719.75	28,024.75
	3	45/100%	45/75%	45/75%	Not applicable	82,800.00	10,687.50	72,112.50	Not applicable
	4	45/100%	45/75%	45/70%	Not applicable	82,800.00	11,362.50	71,437.50	9,450.00
Felton:									
(R. 123-33; Tr. 112-14¶)	1	25 and 80/100%	80/8ths	60/50%	20/20%	602,712.55	458,578.00	144,134.55 (sic)	22,240.00
	2	25 and 80/100%	70/8ths	60/20%	20/20%	603,712.55	464,978.00	138,734.55	25,840.00
	3	25 and 60/100%	60/95%	45/80%	Not applicable	103,478.15	4,650.00	98,828.15	Not applicable
	4	25 and 60/100%	60/95%	45/50%	Not applicable	103,478.15	8,700.00	94,778.15	6,750.00
Commission's Findings:									
(R. 99 at 101-104)	1	?/?	?/?	?/?	?/?	596,000.00	525,080.00	70,920.00	11,120.00
	2	?/?	?/?	?/?	?/?	596,000.00	530,580.00	65,520.00 (sic)	11,720.00
	3	?/?	?/?	?/?	Not applicable	73,600.00	13,800.00	59,800.00	Not applicable
	4	?/?	?/?	?/?	Not applicable	73,600.00	14,100.00	59,500.00	9,000.00

Footnotes:

* The Government conceded that this land would be flooded permanently. (R. 243. Cf. Def. Exh. H, R. 313 at 315.)

† Areas designated by these colors on Government Exh. No. 2 (R. 236) and thus referred to in the testimony.

‡ The nature of the four inquiries was:

No. 1—U. S. flowage easement over 1840 acres of 7400 acre tract.

No. 2—U. S. flowage easement over 1540 acres of 7400 acre tract.

No. 3—U. S. flowage easement if limited to 1840 acre tract.

No. 4—U. S. flowage easement if limited to 1540 acres of an 1840 acre tract.

¶ The witnesses' valuations under the third and fourth inquiries are taken from that portion of the transcript of the hearing on June 3, 1958 (R. 473) which has not been printed.

It should be noted that in all instances the rights acquired by the Government were those described in its certificate of taking (R. 1 at 4) and condemnation petition (R. 8 at 9-10), Exhibit B, attached to the order appointing commissioners (R. 86 at 88-89, 235) and referred to in the commissioners' report (R. 99 at 100-101).

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1960.

United States, Petitioner, v. Virginia Electric and Power Company.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April 3, 1961.]

Mr. Justice Stewart delivered the opinion of the Court.

In 1944 Congress authorized the construction of a dam and reservoir on the Roanoke River in Virginia and North Carolina. For purposes of that project the Government acquired by condemnation a flowage easement over 1840 acres of fast lands adjacent to the Dan River, a navigable tributary of the Roanoke. This 1840-acre tract was part of a 7400-acre estate. The respondent owned a perpetual and exclusive flowage easement over 1540 acres within the easement taken by the Government. The only question presented by this case concerns the compensation awarded to the respondent for the destruction of its easement.

The respondent's easement had been purchased from the owner of the estate and had been conveyed to the respondent's predecessors in title by various deeds over a period of many years, beginning in 1907. Along with the easement the fee owner had also expressly granted by deed the release of all claims for damage to the residue of the estate resulting from the exercise of rights under the easement.

In 1951, after extended negotiations, the owner of the estate agreed to convey to the Government a flowage easement over the 1840-acre tract in return for the pay-

ment of one dollar.[1] This agreement was expressly made subject to "such water, flowage, riparian and other rights, if any," as the respondent owned in the tract. The agreement also provided that the Government could elect to acquire its easement by a condemnation proceeding, in which event the agreed consideration of one dollar would be "the full amount of the award of just compensation inclusive of interest." Exercising this election, the Government instituted condemnation proceedings in the District Court to acquire a flowage easement over the 1840 acres in question, depositing one dollar as the estimated just compensation for the property to be taken. The fee owner acknowledged the settlement contract previously made and agreed to the one dollar compensation. The respondent, whose easement was to be destroyed, intervened in the proceedings to contest "the issue of just compensation."

The District Court made a substantial award to the respondent as compensation for the taking of its flowage easement. The judgment was affirmed by the Court of Appeals for the Fourth Circuit, on the authority of that court's decision in *United States* v. *Twin City Power Co.*, 215 F. 2d 592. 218 F. 2d 524. After the judgment in the *Twin City* case was reversed by this Court, 350 U. S. 222, we vacated the judgment in this litigation and remanded the case to the Court of Appeals for further consideration in the light of our *Twin City* decision. 350 U. S. 956. The Court of Appeals in turn remanded the case to the District Court with instructions that, in computing the amount of compensation to be awarded for the taking of the respondent's easement, there should be eliminated "any element of value arising from the availability of the

[1] The record indicates that the owner was willing to accept this nominal amount because of her interest in developing the balance of the estate as a wild game preserve, a use which presumably would be enhanced by a contiguous artificial lake.

land for water power purposes due to its being situate on a navigable stream. 235 F. 2d 327, 330, rehearing denied 237 F. 2d 165.

On remand the District Court proceeded in accordance with these directions. Commissioners were appointed and given detailed instructions to follow in computing the compensation to be awarded the respondent. These instructions included an explicit direction to exclude from the computation any element of value arising from the availability of the land for water power purposes attributable to its location on a navigable stream.[2] The Commissioners found that, under the criteria imposed by the court, the value of the respondent's easement was $65,520. The district judge accepted these findings, and in accordance with them awarded the respondent that sum. On appeal the judgment was affirmed. 270 F. 2d 707.

We granted certiorari to consider the Government's claim that the respondent's easement had no compensable value when appropriated by the United States. 362 U. S. 947. For the reasons that follow we reject that argument in the extreme form it has been presented, but we have concluded that the judgment must nonetheless be set aside for a redetermination of the compensation award.

It is indisputable, as the Government acknowledges, that a flowage easement is "property" within the meaning of the Fifth Amendment. See *United States* v. *Welch*, 217 U. S. 333; *Panhandle Co.* v. *Highway Comm'n*, 294 U. S. 613, 618; *Western Union Tel. Co.* v. *Penn. R. Co.*, 195 U. S. 540, 570. Similarly, there can be no question that the Government's destruction of that easement would ordinarily constitute a taking of property

[2] The detailed instructions were otherwise based upon a traditional method of valuing what the Government appropriated, *i. e.*, the difference in the value of the servient land before and after the Government's easement was imposed.

within the meaning of the Fifth Amendment. See *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181; *United States* v. *Cress*, 243 U. S. 316, 327–329; *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, 809–811. Nevertheless, it is argued that the Government cannot be required to pay compensation for the destruction of the easement in the present case because the easement was subject to the overriding navigational servitude of the United States.

This navigational servitude—sometimes referred to as a "dominant servitude," *Federal Power Comm'n* v. *Niagara Mohawk Power Co.*, 347 U. S. 239, 249, or a "superior navigation easement," *United States* v. *Grand River Dam Authority*, 363 U. S. 229, 231—is the privilege to appropriate without compensation which attaches to the exercise of the "power of the government to control and regulate navigable waters in the interest of commerce." *United States* v. *Commodore Park*, 324 U. S. 386, 390. The power "is a dominant one which can be asserted to the exclusion of any competing or conflicting one." *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224–225; *United States* v. *Willow River Co.*, 324 U. S. 499, 510. A classic description of the scope of the power and of the privilege attending its exercise is to be found in the Court's opinion in *United States* v. *Chicago, M., St. P. & P. R. Co.*:

> "The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing cases.] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that

property has always been subject." 312 U. S. 592, 596–597.

Since the privilege or servitude only encompasses the exercise of this federal power with respect to the stream itself and the lands beneath and within its high-water mark, the Government must compensate for any taking of fast lands which results from the exercise of the power. This was the rationale of *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, where the Court held that when a navigable stream was raised by the Government to its ordinary high-water mark and maintained continuously at that level in the interest of navigation, the Government was liable "for the effects of that change [in the water level] upon private property beyond the bed of the stream." 339 U. S., at 800–801. See also *United States* v. *Willow River Co.*, 324 U. S. 499, 509.

But though the Government's navigational privilege does not extend to lands beyond the high-water mark of the stream, the privilege does affect the measure of damages when such land is taken. In *United States* v. *Twin City Power Co.*, 350 U. S. 222, we held that the compensation awarded for the taking of fast lands should not include the value of the land as a site for hydroelectric power operations. It was pointed out that such value, derived from the location of the land, is attributable in the end to the flow of the stream—over which the Government has exclusive dominion. 350 U. S., at 225–227. Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, *United States* v. *Commodore Park*, 324 U. S. 386, 390–391; *Scranton* v. *Wheeler*, 179 U. S. 141, 162–165; *Gibson* v. *United States*, 166 U. S. 269, 276, it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.

The Government's argument is that the rationale of *Twin City* makes payment of any compensation for the destruction of the respondent's easement unnecessary in the present case. This argument is based on the theory that the respondent's easement had no value save in conjunction with water power development. The respondent acknowledges that the courts below were correct in excluding any value of the easement derived from the availability of the land for water power purposes. It argues, however, that the easement had other value, derived from uses of the land not dependent upon the flow of the stream. If the easement did have such value, then the Government must compensate for the easement's destruction under the rule of *Kansas City Ins. Co., supra*, since the easement was a property right in fast lands. The basic issue is thus whether the respondent's easement might be found to have value other than in connection with the flow of the stream.

We think such a finding might be warranted. The evidence was that the highest and best use of the servient land (unconnected with riparian uses) was for agriculture, timber and grazing purposes. The respondent had an exclusive and perpetual property right to destroy those uses and the value which they created. This right was an attribute of a transferable, commercial easement with intrinsic value. It had been acquired for a valuable consideration. It had a marketability roughly commensurate with the marketability of the subservient fee. Only an adventurous purchaser would have acquired the underlying fee interest in the 1540-acre tract for any purpose whatever, without also purchasing the easement.

If easements to flood fast lands were worthless as a matter of law when taken by the United States, it would follow that when the Government took such an easement from the owner of an unencumbered tract of land, the Government would have to pay the owner nothing.

That is not the law. *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799. The Government itself acknowledges that it must pay such a landowner for the value of the property which does not stem from the flow of the stream, the value based upon the nonriparian uses of the property.

It follows that the Government must likewise compensate the easement owner for that aspect of the easement's value which is attributable not to water power, but to the depreciative impact of the easement upon the nonriparian uses of the property. The valuation of an easement upon the basis of its destructive impact upon other uses of the servient fee is a universally accepted method of determining its worth. See, *e. g.*, *Olson* v. *United States*, 292 U. S. 246, 253; *Karlson* v. *United States*, 82 F. 2d 330, 337; Jahr, Eminent Domain, 252 and n. 6 (collecting cases); 4 Nichols, Eminent Domain, § 12.41 [2], n. 27 (collecting cases) (1951 ed.); 1 Orgel, Valuation under Eminent Domain, § 106, at 454 (2d ed.); Saxon, Appraising Flowage Easements, 24 Appraisal Journal 490, 494.

But the Government contends that the market value of the easement to those interested in developing the nonriparian uses of the fee can be ignored. It is claimed that, despite the general principle of indemnification underlying the Fifth Amendment, see *Olson* v. *United States*, 292 U. S. 246, 255, no compensation should be allowed for this value because it represents the "destructive function" of the easement. Cf. *Roberts* v. *New York*, 295 U. S. 264, 283. It is argued that equitable principles prohibit compensation for such value. But equity works the other way. At the very least, the Government's argument would mean, in a case like this one, that compensation could be denied the fee owner because he had already conveyed the flowage easement, cf. *United States* v. *Sponenbarger*, 308 U. S. 256, 265–266, and denied the owner of the easement because it was valueless against condemnation by the United States. The Government would thus

destroy the entire property interest in fast lands without compensation. "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . . ." *United State* v. *Commodities Corp.*, 339 U. S. 121, 124; see *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324–326. The result contended for by the Government would hardly comport with those standards. The District Court and the Court of Appeals were correct in holding that a flowage easement over fast lands adjoining a navigable stream is property which cannot be appropriated without compensating the owner.

The remaining question is whether the District Court's method of determining the amount of compensation to be awarded was correct. The court was clearly right in excluding all value attributable to the riparian location of the land. *United States* v. *Twin City Power Co.*, 350 U. S. 222. There can be no quarrel either with the court's procedure in directing the Commissioners to appraise first the easement taken by the Government, and then to apportion its value between the respondent and the owner of the subservient fee.[3] *United States* v. *Dunnington*, 146 U. S. 338, 343–345, 350–354. And the court adopted an acceptable method of appraisal, indeed the conventional method, in valuing what was acquired by the Government by taking the difference between the value of the property before and after the Government's easement was imposed. See *Olson* v. *United States*, 292 U. S. 246, 253.[4] For these reasons we think that the

[3] The owner of the fee, having agreed to convey her interest for one dollar, would, of course, not receive any larger amount apportioned to her interest. See *Albrecht* v. *United States*, 329 U. S. 599.

[4] In determining the value of the Government's easement, the court assumed its proportions to be limited to 1540 acres, rather than to the 1840 acres actually taken. This was entirely permissible. Since the owner of the fee was making no claim, the only objective of the proceedings in the District Court was to determine the amount of compensation to be awarded the respondent. It was quite logical,

court followed an entirely acceptable procedure in valuing the totality of what was appropriated by the Government.

In apportioning the respondent's share of this value, however, we think that the court erred.[5] The court apparently was of the view that the subservient fee interest in the 1540 acres was without value, and accordingly awarded to the respondent the entire value of what the Government appropriated in that acreage. The respondent was thus compensated as though it were the owner, not of an easement, but of an unencumbered fee, as the Court of Appeals recognized. 270 F. 2d, at 712. The record does not support such an apportionment.

The guiding principle of just compensation is reimbursement to the owner for the property interest taken. "He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U. S. 246, 255. In many cases this principle can readily be served by the ascertainment of fair market value—"what a willing buyer would pay in cash to a willing seller." *United States* v. *Miller*, 317 U. S. 369, 374. See *United States* v. *Commodities Corp.*, 339 U. S. 121, 123; *United States* v. *Cors*, 337 U. S. 325, 333. But this is not an absolute standard nor an exclusive method

---

therefore, to appraise only that part of the Government's easement which coincided with the respondent's property interest, and thereafter to apportion to the respondent its share of what was taken by that much of the Government's appropriation.

[5] The court did not err, however, in including in the award to the respondent an amount for damages to the residue of the estate. The respondent was the record owner of the right to damage the residue, a right which the owner had expressly conveyed by separate deed for a valuable consideration. This was a property right in the residue, measurable by a monetary award to cover damages to the same. The amount of this portion of the award would depend upon the probability of the respondent's easement being exercised. See accompanying text, *infra*.

of valuation. See *United States* v. *Commodities Corp.*, *supra*, at 123; *United States* v. *Cors*, *supra*, at 332; *Miller* v. *United States*, *supra*, at 374–375; *United States* v. *Toronto Nav. Co.*, 338 U. S. 396.

The record in the present case, as might be expected, contains no evidence of a market in flowage easements of the type here involved. In the absence of such evidence, the court valued the flowage easement as the equivalent of the value of the subservient lands for agricultural, forestry, or grazing use. The court thus ascribed a maximum value to the respondent's easement, a value not supported by the record.

We think the correct approach to the problem of valuation in a case of this kind was formulated by the Court of Appeals for the Fifth Circuit in *Augusta Power Co.* v. *United States*, 278 F. 2d 1. The basic issues in that case were virtually indistinguishable from those presented here.[6] We are content to adopt the language of Judge Rives' opinion with respect to the standard to be followed in valuing flowage easements of this character:

> "If [the] Power Company had been successful in assembling the necessary lands, and in securing approval of the Federal Power Commission, and thereafter had actually exercised its easements by permanently flooding the lands, their value for agricultural and forestry purposes would have been destroyed. If, with that status, the United States had condemned the lands, the compensation due would be payable to [the] Power Company. That

[6] In that case the Government had also argued upon the basis of our *Twin City* decision, that a private flowage easement over fast lands is valueless as a matter of law when taken by the Government for navigational purposes. The argument was unambiguously rejected: "Very clearly, the United States is 'in error when it claims . . . that it 'has a dominant servitude which it can exercise in its discretion and without compensation.'" 278 F. 2d, at 4.

compensation would not include the hydroelectric power value, but it would embrace [the Power Company's] property right to destroy the value of the lands for agricultural and forestry purposes.

"At the other extreme, if factors such as difficulty of assemblage of all necessary lands, the increasing economic advantage of steam plants over hydroelectric plants, the need for additional power in the particular area, etc., had made it certain that the flowage easements would never be exercised by the . . . Power Company or its assigns, *excluding the United States*, then such compensation as might be due would be payable to the owners of the fee title and nothing to the . . . Power Company.

"Between the two extremes just illustrated, the respective values of the fee and of the easement would fluctuate from time to time depending on the probability or improbability of actual exercise of the easement by the . . . Power Company or its assigns. If all interested parties were before the Court, the *maximum* which the United States would be required to pay would be the value of the lands, not including their value for hydroelectric power purposes. That is, however, a *maximum*, and not necessarily the measure of what the United States would have to pay under any and all circumstances.

. . . . . .

"It seems to us that the *maximum* compensation payable for the flowage easement under any conceivable circumstances is so much of the value of the lands for agricultural and forestry purposes and for any other uses, not including hydroelectric power value, as the easement owner has a right to destroy or depreciate. That *maximum* is more simply expressed in the criterion adopted by the Commission, *i. e.*, 'the difference in the value of the land with and

without the flowage easement.' Subject to that *maximum*, the actual *measure* of compensation payable for the flowage easement is the value of the easement to its owner. 'The question is, What has the owner lost? not, What has the taker gained.' 1 Orgel on Valuation Under Eminent Domain, p. 352." *Augusta Power Co.* v. *United States*, 278 F. 2d 1, 4–5. (Footnotes omitted.)

In a word, the value of the easement is the nonriparian value of the servient land discounted by the improbability of the easement's exercise. It is to be emphasized that in assessing this improbability, no weight should be given to the prospect of governmental appropriation. The value of the easement must be neither enhanced nor diminished by the special need which the Government had for it. *United States* v. *Cors*, 337 U. S. 325, 332–334; *United States* v. *Miller*, 317 U. S. 369; *Olson* v. *United States*, 292 U. S. 246, 261; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 76. The court must exclude any depreciation in value caused by the prospective taking once the Government "was committed" to the project. *United States* v. *Miller*, *supra*, at 376–377; see *United States* v. *Cors*, *supra*, at 332. Accordingly, the impact of that event upon the likelihood of actual exercise of the easement cannot be considered. As one writer has pointed out, "[i]t would be manifestly unjust to permit a public authority to depreciate property values by threat of . . . [the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property" when eventually condemned. 1 Orgel, Valuation under Eminent Domain, § 105, at 447 (2d ed.); see *Congressional School of Aeronautics* v. *State Roads Comm'n*, 146 A. 2d 558, 565 (Md.).

The judgment is vacated, and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1960.

United States, Petitioner, v. Virginia Electric and Power Company.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April 3, 1961.]

Mr. Justice Douglas, concurring.

If the 1,840 acres in question lay between low and high water, the United States by keeping the water level at the ordinary high-water contour would not in my view appropriate any private property. For that is use of the bed of the stream pursuant to the navigation servitude. Most of our cases deal with that. It was in that domain that *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, arose.

If the 1,840 acres were a dam site, any of their value for such a purpose would be noncompensable within the ruling of *United States* v. *Twin City Power Co.*, 350 U. S. 222. Dam site value is water-power value. And the flow of the stream in its natural state or through a structure that is low or high provides "a head of water" (*United States* v. *Willow River Co.*, 324 U. S. 499, 502) that often has great value. But when it is in a navigable stream, it is not a property right subject to private ownership and compensation under the Fifth Amendment. There is "no private property in the flow" of this navigable stream. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427.

Yet if the Federal Government builds a dam that raises the water above the ordinary high-water mark by a foot, by a hundred feet, or by five hundred feet, it asserts

dominion over property not within its navigational servitude. As we said in *United States* v. *Willow River Co.*, *supra*, 509, "High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid."

It is in the latter domain that the present controversy lies. The flowage rights being condemned are rights to flood a part of the 1,840-acre tract that lies above the "usual water line" which I understand to mean land above the ordinary high-water mark.

Whatever may be the reason why this particular interest in the uplands was acquired, the owner stands in the shoes of his predecessor in title. The owner of the easement is entitled, as the Court holds, to no water-power value. The owner is in other words entitled to nothing that gains value from the flow of the stream, from any head of water, or from the strategic location of his land for hydroelectric development of the river. But the owner of the easement and the owner of the subservient fee have all the other parts of the bundle of rights that represent "property" within the meaning of the Fifth Amendment.

Hence, I join the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1960.

United States, Petitioner, v. Virginia Electric and Power Company.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April 3, 1961.]

Mr. Justice Whittaker, with whom The Chief Justice and Mr. Justice Black join, dissenting.

In the hope that it might eventually acquire from the Federal Government a license to construct a power dam across a navigable river, the power company acquired, by conveyances from the fee owners, easements permanently to flood 1,540 acres of fast lands adjacent to the river. It did not own any other estate or interest in those lands, and the exercise of its easement to flood them was, of course, necessarily subject to the prior issuance of a federal license authorizing the private damming of the river, for without such a license the power company could not dam the river, see § 4 of the Federal Power Act, 41 Stat. 1065, 16 U. S. C. § 797, and thus back its waters upon those lands, and it had no right to use the lands for any other purpose.

No federal license to dam the river at or near this point was ever issued. Instead, the Federal Government determined to itself construct a power dam at this point in the river, and as a necessary consequence to inundate these lands as a part of the resulting reservoir. To that end, it brought this condemnation action against the power company, and therein filed its declaration of taking, and took, the latter's easement to back flow these lands, and the question here is: What value, if any, did that easement have *to the power company at the time* the Government took it?

We think that, as a matter of fact and of law, it did not have any value whatever at that time. This is so because: (1) The sole and only right the power company ever had in these lands was the right to dam and back the river's waters upon them; (2) the exercise of that right was always contingent and dependent upon the prior issuance of a federal license authorizing the private damming of the river (16 U. S. C. § 797(e)), for the Government's power over the flow of a navigable stream "is a dominant one which can be asserted to the exclusion of any competing or conflicting one." *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224–225, and (3) when the Government determined to construct the power dam and appurtenant facilities for its own benefit, it necessarily "displace[d] all competing interests and appropriate[d] the entire flow of the river for the declared public purpose," *United States* v. *Twin City Power Co.*, *supra*, at 225. (4) Therefore, at the time the Government took this easement, there was no possibility that the power company could ever dam and back the river's waters upon these lands and, inasmuch as it had no estate in or right to use the lands for any other purpose, it must follow that the easement was wholly without value to the power company for any purpose at the time the Government took it.

However, the Court, after adverting to the power company's argument that "the easement had other value, deriving from uses of the land not dependent upon the flow of the stream," says: "We think such a finding might be warranted." It finds such value to exist in the "right to destroy [agriculture, timber and grazing] uses and the value which they created."

But the right to "destroy" agricultural uses, although a proper consideration in determining the damages to be paid to the owner of the unencumbered fee when an easement to flow is being condemned and taken from him, *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799;

Olson v. *United States*, 292 U. S. 246, 253–254, is not a thing of value—even of recognizable "hold up" value—to the owner of the easement. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 79–80, except for the authorized flooding use; or possibly as against the owner of the subservient fee who might be willing to pay for the riddance of the easement and restoration of his original right to make agricultural uses of the land. *See Roberts* v. *New York City*, 295 U. S. 264, 282–283. At all events, the clincher is that any right of the power company to "destroy" agricultural uses of these lands consisted solely of its right to dam and back the river's waters upon them and when the Government determined to construct the dam for its own benefit even that nebulous "right" was gone. Hence, the easement had no possible value—not even a nuisance value—to the power company at the time the Government took it.

It is settled that the "just compensation" required by the Fifth Amendment to be paid for the taking of private property for public use is the value at the very time of the taking to the person from whom taken. "The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purposes for which it was taken. *Kerr* v. *Park Commissioners*, 147 U. S. 379, 387; *Shoemaker* v. *United States*, 147 U. S. 282, 304, 305." *United States* v. *Chandler-Dunbar Co.*, *supra*, at 76.

The Fifth Amendment "merely requires that an owner of property taken should be paid for what is taken from him. . . . And the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195. See also *United States* v. *Twin City Power Co.*, *supra*, at 228. At the time of this taking, the Government had determined to build the dam itself, thus precluding any possibility that

the power company could ever dam and back the river's waters upon these lands, and, inasmuch as it had no right to use them for any other purpose, it must follow that the easement had no possible value to the power company at the time the Government took it. Surely "the Government cannot be justly required to pay for an element of value which did not [then] inhere in [the easement]." *United States* v. *Chandler-Dunbar Co.*, *supra*, at 76.

Nor does the Fifth Amendment contemplate a disregard of separate estates and interests in land. It contemplates only that the condemnee shall be paid "just compensation" for the particular estate or interest that he owned and that was taken from him. In *Boston Chamber of Commerce* v. *Boston*, *supra*, the city condemned for public street purposes a part of a tract of land owned in fee by the Chamber of Commerce, but over a large portion of the part condemned a wharf company owned "an easement of way, light and air." The Chamber of Commerce and the wharf company agreed between themselves to claim, and they sought, damages to both estates "in a lump sum." If this could be done, it was agreed that the estate, considered as the sole unencumbered estate of a single person, was worth 12 times more than if the damage should be assessed according to the condition of the title at the time. The city's contention that the several estates should be separately valued was sustained by the trial court, and this Court, speaking through Mr. Justice Holmes, affirmed, saying:

> "But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is

> taken from him. . . . And the question is what has the owner lost, not what has the taker gained." 217 U. S., at 195.

The Government cannot here, just as the city could not there, "be made to pay for a loss of theoretical creation, suffered by no one in fact," *id.*, at 194, for there is "no justice in [requiring the Government to pay] for a loss suffered by no one in fact." *United States* v. *Chandler-Dunbar Co.*, *supra*, at 76.

Here the power company rests solely upon a claimed right to back the river's waters upon these lands. It thus necessarily depends upon and claims a right in and to use the waters of the river for that purpose. This Court held in the *Twin City* case, *supra*, that the owner of adjoining fast lands has no interest in the waters of a navigable river, and that those waters do not, as against the Government, attribute to the value of such lands. It said:

> "If the owner of the fast lands can demand water-power value as part of his compensation, he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. The right has value or is an empty one dependent solely on the Government. What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys." 350 U. S., at 228.

The Government, by determining to exploit its stream for its own benefit, "displace[d] all competing interests and appropriate[d] the entire flow of the river for the declared public purpose." *Id.*, at 225. In these circumstances, "[t]o require the United States to pay for this water-power value would be to create private claims in the public domain." *Id.*, at 228.

The *Twin City* and *Chandler-Dunbar* cases, *supra*, seem clearly to require the conclusion, on the facts here, that the easement to flood these lands had no value to the power company at the time the Government took it.

It was its failure to obtain a federal license to dam the river—not the taking of its easement to flow—that hurt the power company, for once the Government determined to construct the power dam for its own use and benefit no possibility remained that the power company could ever use the easement, and hence its entire value was gone.

To the Court's observation that "the Government's argument would mean, in a case like this one, that compensation could be denied the fee owner because he had already conveyed the flowage easement. . . . and denied the owner of the easement because it was valueless against condemnation by the United States," the law requires us to say: Exactly so. The fee owners had sold and conveyed, for consideration satisfactory to them, the right permanently to flood these lands and no longer owned any interest in *that estate*. Indeed, they claim none. That estate in these lands was not taken by the Government from them. Not having taken anything from the fee owners, the Government does not owe them "just compensation" for anything. This also demonstrates the Court's further error in remanding the case for "apportionment" of the "damages" between the owner of the easement and the owners of the fee. In no event could there be anything to apportion to the fee owners. What the Government took was the easement. It belonged solely to the power company, and if it had any value at the time it was taken by the Government, that value belonged solely to the power company. But the easement had no value to the power company at the time it was taken by the Government. The power company's sole estate in these lands was an easement to back the river's

waters upon them. The exercise—and hence the value—of that easement was always contingent upon the prior issuance of a federal license authorizing the private damming of the river. No such license was ever issued. Instead, the Government determined to construct the dam and appurtenant facilities for its own benefit. This left no possibility that the power company could ever dam and back the river's waters upon these lands, and inasmuch as it had no right to use them for any other purpose, it seems clearly to follow that the easement was wholly without value to the power company for any purpose at the time the Government took it.

It is of course true, as already stated, that if the Government had taken the right to flow these lands from the owner of the unencumbered fee, the law would require it to pay his damages resulting from that deprivation of his right to make agricultural and similar surface uses of these lands. *United States v. Kansas City Ins. Co., supra.* From that premise it is argued that the owner of the easement to flow, having acquired it from the owner of the unencumbered fee, "stands in the shoes of his predecessor in title" and is thus entitled to like damages from the Government when it takes that easement from him. But that premise is erroneous. The error lies in the obvious fact that the power company never acquired or owned any right to make agricultural uses of these lands. Hence it did not suffer, and is not entitled to recover, any damages for the destruction of such uses. Quite distinguishable from an unencumbered fee, the only estate of the power company in these lands was the right to store the river's waters upon them. Once the Government determined to construct the power dam for its own use no possibility remained that the power company could ever use the lands for that purpose and, having no right to use the lands for any other purpose, it must follow that the easement was wholly without value to the power

company for any purpose at the time the Government took it.

We believe that the Fifth Amendment's command that "private property [shall not] be taken for public use, without just compensation" should be liberally construed in favor of the condemnee, but that does not mean that the Government should be required to pay something for nothing.

For these reasons, we think the judgment should be reversed with directions to enter judgment for the Government.